FILED

No. 87-1287

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
and
DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Michigan.

BRIEF OF RESPONDENTS

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

GEORGE H. WELLER
Assistant Attorney General
Attorneys for Respondents

QUESTION PRESENTED FOR REVIEW

Did Congress intend to include states and state officials in their official capacity in the meaning of the word "person" in §1 of the 1871 Civil Rights Act (currently 42 USC §1983)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	xv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	
I. THE 42D CONGRESS DID NOT INTEND THE WORD "PERSON" IN §1 OF THE CIVIL RIGHTS ACT OF 1871 TO INCLUDE THE STATES	15
A. BECAUSE THE ACT DOES NOT EXPRESSLY PROVIDE THAT STATES ARE "PERSONS" IT IS NECESSARY TO INTERPRET THE ACT, AND IN COMMON USAGE THE WORD "PERSON" DOES NOT INCLUDE A SOVEREIGN STATE	15
B. THE DICTIONARY ACT, 16 STAT 431, CH 71, DID NOT INCLUDE THE STATES WITHIN THE MEANING OF THE WORD "PERSON" IN THE CIVIL RIGHTS ACT OF 1871	18
C. IN 1871 CONGRESS DID NOT GENERALLY INTEND THE WORD "CORPORATION" TO INCLUDE STATES	23

	Page
D. THERE IS NO INDICATION FROM THE PURPOSE, THE SUBJECT MATTER, OR THE CONTENT OF THE CIVIL RIGHTS ACT OF 1871, IN THE CONTEXT OF "THE EVENTS AND PASSIONS OF THE TIME AT WHICH IT WAS ENACTED", THAT THE STATES WERE TO BE INCLUDED WITHIN THE MEANING OF "PERSON"	27
E. THE LEGISLATIVE HISTORY OF §1 OF THE CIVIL RIGHTS ACT OF 1871 DOES NOT DEMONSTRATE ANY AFFIRMATIVE INTENT TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON", OR TO ABROGATE THE STATES' TRADITIONAL IMMUNITY IN THEIR OWN COURTS	41
F. CONCEPTS OF FEDERALISM PREVALENT DURING RECONSTRUCTION SUPPORT THE CONCLUSION THAT THE 42D CONGRESS DID NOT INTEND TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON" OR TO ABROGATE THE STATES' TRADITIONAL IMMUNITY FROM ACTIONS FOR DAMAGES IN THEIR OWN COURTS	62
G. THIS COURT'S PRIOR DECISIONS DO NOT SUPPORT PETITIONER	71

Page

II. A CAUSE OF ACTION UNDER §1 FOR DAMAGES AGAINST A STATE OFFICER IN THE OFFICER'S OFFICIAL CAPACITY IS A CAUSE OF ACTION AGAINST THE OFFICE, NOT AGAINST THE PERSON OF THE STATE OFFICER, HENCE IT IS A CAUSE OF ACTION AGAINST THE STATE, WHICH IS NOT A "PERSON" 80

CONCLUSION 93

TABLE OF AUTHORITIES

Page

CASES

Alabama v Pugh,
438 US 781 (1978) 77

Atascadero State Hospital v Scanlon, 473 US 234 (1955) 63

Auditor v Davis,
2 Ark 494 (1840) 85

Bank of Washington v State of Arkansas, 61 US (20 How) 530 (1857) 66

Beers v State of Arkansas,
61 US (20 How) 527 (1857) 66

Brandon v Holt,
469 US 464 (1985) 86

Civil Rights Cases,
109 US 3 (1883) 35

Cowles v Mercer County,
74 US (7 Wall) 118 (1868) 24

Della Grotta v State of Rhode Island, 781 F2d 343 (CA 1, 1986).. 46

District of Columbia v Carter,
409 US 418 (1983) .....passim

Edelman v Jordan,
415 US 651 (1974) 76

Employees v Missouri Department of Public Health & Welfare,
411 US 279 (1973) 63

Page

Felder v Casey, ___ US ___,
56 USLW 4689 (No. 87-526,
June 22, 1988) 37,41

Ford Motor Co v Department of
Treasury of the State of Indiana,
323 US 459 (1945) 82-83

Governor of Georgia v Madrazo,
26 US (1 Pet) 110 (1838) 81

Green v Mansour,
474 US 64 (1985) 89-90

Hagans v Levine,
415 US 528 (1974) 72

Hans v Louisiana,
134 US 1 (1890) 66

Hutto v Finney,
437 US 678 (1978) 78

Kenosha v Bruno,
412 US 507 (1973) 91

Kentucky v Graham,
473 US 159 (1985) 41,76,78,83,90

Lake County Estates v Tahoe
Regional Planning Agency,
440 US 391 (1979) 72

Larson v Domestic & Foreign
Commerce Corp, 337 US 682 (1949).. 89

League v DeYoung,
2 Tex 497 (1847) 85

Liverpool Insurance Company v
Massachusetts,
77 US (10 Wall) 566 (1871) 23

Page

Lowenstein v Evans,
69 F 908 (DSC 1895) 25

Lowery v Department of
Corrections, 146 Mich App 342,
380 NW 2d 99 (1985) 4

Maine v Thiboutot,
448 US 1 (1980) 74-76

Martinez v California,
85 Cal App 3d 430,
149 Cal Rptr 519 (1978) 73

Martinez v California,
444 US 277 (1980) 73

Meda v City of Howell,
110 Mich App 179,
312 NW 2d 202 (1981) 4

Michigan State Bank v Hammond,
1 Doug 527 (Mich 1845) 87-88

Mitchum v Foster,
407 US 225 (1972) 37

Monell v Department of Social
Services of the City of
New York, 436 US 658 (1978) .... passim

Monroe v Pape,
365 US 167 (1961) 19,39,43

National Labor Relations Board v
Fruit & Vegetable Packers and
Warehousemen, Local 760,
377 US 58 (1964) 58

Page

Northwestern Fertilizing Co v Hyde Park, 18 F Cas 393 (No. 10,336) (CC ND Ill) (1873) .. 24

Osborn v The Bank of the United States, 22 US (9 Wheat) 738 (1824) 87

Owen v City of Independence, Missouri, 445 US 622 (1981) 24

Papasan v Allain, 478 US 265 (1986) 84,88

Paul v Virginia, 75 US (8 Wall) 168 (1869) 23

Pennhurst State School & Hospital v Halderman, 465 US 89 (1984) 63,83,89,90

The President, Directors, and Company of the Miner's Bank of Dubuque v State of Iowa, 53 US (12 How) 1 (1851) 25

Quern v Jordan, 440 US 332 (1979) ..... passim

Railroad Company v Tennessee, 101 US 337 (1879) 66

Scott v Jones, 46 US (5 How) 342 (1847) 24

Slaughter-House Cases, 83 US (16 Wall) 36 (1873) 28

Texas v White, 74 US (7 Wall) 700 (1868) 24

Thiboutot v State of Maine, 405 A2d 230 (Me, 1979) 74-76

Page

United States v Cruikshank, 92 US 542 (1876) 65

Welch v Texas Department of Highways, 483 US ___, 97 L Ed 2d 389 (1987) 63

Wilson v Omaha Indian Tribe, 442 US 653 (1979) 17,71

Ex parte Young, 209 US 123 (1908) 76,88,89

CONSTITUTIONS, STATUTORY MATERIAL, COURT RULES

State

Mich Const 1963, art 11, §5 5

MCLA 600.2051(4); MSA 27A.2051(4) .. 4

MCLA 600.6419; MSA 27A.6419 4

1950 Public Acts 38, 39, 40 (Extra Session) 1

General Court Rules 1963, Rule 201.3(5) 4

Michigan Court Rules of 1985, Rule 2.201(c)(5) 4

Federal

U. S. Constitution

Amendment 11 ..... passim
Amendment 13 55
Amendment 14 .....passim
Amendment 15 55

Page

14 Stat 27, ch 31 (April 9, 1866)
(Civil Rights Bill of 1866) 35

14 Stat 74, ch 140, §3
(June 27, 1866) 19

14 Stat 364, Joint Resolution 73
(July 24, 1866) 32

14 Stat 428, ch 153
(March 2, 1866) 32

15 Stat 14, ch 30 (June 9, 1867) ... 32

16 Stat 140, ch 114
(May 31, 1870) ("Force Act") 35,36

16 Stat 431, ch 71 (Feb. 25, 1871)
("Dictionary Act") 9-10,18-19

16 Stat 433, ch 99 (Feb. 28, 1871)
("Second Force Act") 36

17 Stat 13, ch 22 (April 20, 1871)
("Civil Rights Act",
"Ku Klux Klan Act") .....passim

17 Stat 579, ch 24, §3
(March 3, 1873) 20

18 Stat 113, ch 333
(June 20, 1874) 21

19 stat 268, 269, ch 82, §4
(March 2, 1877) 22

42 USC §1983 .....passim

42 USC §1988 .....

HR 1215, 43d Cong (1874) 21

R.S. 1 (1st ed 1874) 10,21

Page

R.S. 1 (2d ed 1878) 10,22

Revision of the United States
Statutes as Drafted by the
Commissioners Appointed for
That Purpose (1872) 20

Senate Bill 1983, 96th Cong (1979).. 61

Senate Bill 990, 97 Cong (1981) 61

Sen Exec Doc, 41st Cong,
3rd Sess (1871) No 16,
parts 1, 2 36

CONGRESSIONAL DEBATES;
ATTORNEY GENERAL OPINION

Cong. Globe

41st Cong, 3d Sess 146
(December 16, 1870) 36

42d Cong, 1st Sess (1871)

364-366 (March 31) 58
367-368 (March 31) 50
374-376 (March 31) 48
456-461 (April 4) 46-47
476 (April 5) 50
481-482 (April 5) 26,48
501-502 (April 6) 59
568 (April 11) 48
577 (April 11) 57
650-651 (April 13) 56
661-662 (April 13) 26
696 (April 14) 26,51
791 (April 19) 60

Page

App 68 (March 28) 47
78-80 (March 31) 48
80 (March 31) 25
81 (March 31) 54,55
83 (March 31) 55
85-86 (March 31) 53,54
150-153 (April 4) 50,51
217 (April 13) 58
229 (April 13) 52
310 (March 30) 48
312-313 (April 6) 48
314-315 (April 6) 25

Cong Record
43d Cong, 1st Sess (1874)
vol 2, part 1, p 819 (Jan. 21) ... 21

23 Op Att'y Gen 428
(March 26, 1901) 24

BOOKS, PERIODICALS

2 G. S. Boutwell: REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (1902) 39

H. Carter: THE ANGRY SCAR (1959) ..28,29

A. Conkling: A TREATISE OF THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES (4th ed 1864) 25

COOLEY'S BLACKSTONE 155, n. 2 (1st ed 1871) 66

Developments in the Law: Section 1983 and Federalism, 90 Harv L Rev 1133 (1977) 45

W.E.B. DuBois: BLACK RECONSTRUCTION IN AMERICA (1956) 28

Page

Englander, Amenability of States to Section 1983 Suits: Reexamining Quern v Jordan, 62 Boston U L Rev 731 (1982) 46

E. Foner: RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988) .....passim

Graham, Our "Declaratory" Fourteenth Amendment, 7 Stanford L Rev 3, 18 (1954) 29

1 J. Kent: COMMENTARIES ON AMERICAN LAW (11th ed, Comstock, 1867) 25,66

Matascar, Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis, 40 Ark L Rev 741 (1987) 57

McBirney, Quern v Jordan, A Misdirected Bar to Section 1983 Suits Against States, 67 Calif L Rev 407 (1979) 46

W. S. McFeeley: GRANT: A BIOGRAPHY 369 (1981) 38,39

Nowak, The Scope of Congressional Power to Create Courses of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Columbia L Rev 1413 (1975) 44,45

Sagafi-Nijad, Proposed Amendments to Section 1983 Introduced in the Senate, 27 Saint Louis Univ L J 373 (1983) 61

Page

K. M. Stamp: THE ERA OF RECONSTRUCTION (Vintage Books 1965) 28,29,31

J. Story: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed 1858) §1687, p 522 23,67

J. ten Broek: EQUAL UNDER LAW (1965) 29

A. W. Trelease: WHITE TERROR 387-388 (1971) 38

L. Tribe: AMERICAN CONSTITUTIONAL LAW (2d ed 1988) 35

Zagrans, "Under Color of What Law: A Reconstructed Model of Section 1983 Liability, 71 Va L Rev 499 (1985) 43

STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1871 ("Ku Klux Klan Act") ("Third Force Act"); 17 Stat 13, ch 22, §1 (1871).

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication', and the other remedial laws of the United States which are in their nature applicable in such cases..."

Section 2 of the "Dictionary Act"; 16 Stat 431, ch 71, §2 (1871).

SEC.2. And be it further enacted, That in all acts hereafter passed words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non-compos, lunatic, and insane person; and the word "person" may extend and be applied to bodies politic and corporate, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and the word "oath" shall include "affirmation" in cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall include the word "affirmed."

Subsequently clarified in Revised Statutes §1 (1st ed 1874), and Revised Statutes §1 (2d ed 1878).

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fiveth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the

masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, noncompos, lunatic and insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Section 2 of the Civil Rights Bill of 1866; 14 Stat 27, ch 31, §2 (1866).

SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

No. 87-1207

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
and
DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Writ of Certiorari
to the Supreme Court of Michigan.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The Michigan State Police were required by 1950 Michigan Public Acts, Extra Session, No. 38, 39 and 40 (Pet. App. 1a-7a) to compile information on, and to investigate activities pertaining to, broad and ill-defined areas relating to subversion and security. With the consent

of the Michigan Attorney General, these laws (popularly referred to as the "red squad" laws) were declared unconstitutional by a Michigan Circuit Court on February 3, 1976 in litigation unrelated to the instant case (Pet. App. 12a-13a), and were repealed in 1978.

The "red squad" records of Petitioner's brother were released to his brother in 1977. At that time Petitioner learned that because his brother's name had been in the files, Petitioner had not been considered by the State Police for a lateral transfer in 1973 from Administrative Analyst 11 at the Michigan Department of Mental Health to Data Systems Analyst 11 at the Michigan Department of State Police. Two months and seven days later, he had obtained a

Data Systems Analyst 11 position with the Michigan Department of Transportation.

When Petitioner learned in 1977 of the reason he was not considered by the State Police, he filed a Civil Service grievance that was originally denied because it was too late. He appealed this administrative denial to the Michigan Circuit Court, as is provided for by Michigan law. Michigan Attorney General Frank J. Kelley then entered the case for the state defendants and moved on March 31, 1978 for the return of the grievance to the Civil Service grievance system for a full hearing, which was ordered on June 26, 1978 (J.A. 13-14).

In November of 1978, Petitioner sued the State in a separate original action (J.A. 15-23) in the Michigan Court of Claims.[1] Paragraph 32 of Count I (J.A.

---

[1]In the Michigan Court of Claims the sole defendant is the State of Michigan. MCLA

20) the only Count to survive various motions by the State in the Court of Claims (J.A. 24-30), set forth various allegations relating to the Michigan State Police and Petitioner's brother; then, in paragraph 33, Petitioner alleged

> "That the aforesaid compilation and use of the files of Plaintiffs brother was accomplished under color of State law contrary to 42 USC sec. 1983." (J.A. 20).

600.6419 (Pet. App. 16a-18a); MSA 27A.6419. Suits against state officials in their official capacities for retroactive damages are entertained in the Michigan Court of Claims because these suits are considered to be suits against the state itself. Michigan Compiled Laws Annotated ("MCLA") 600.2051(4); Michigan Statutes Annotated ("MSA") 27A.2051(4); "Actions to which this state ... is a party may be brought ... against the official capacity of an officer authorized to be sued in its behalf ...". Accord: Michigan General Court Rule 1963, 201.3(5) (Now Michigan Court Rule 1985, 2.201(C)(5)). See: Lowery v Department of Corrections, 146 Mich App 342, 348, 380 NW2d 99, 103 (1985), lv den 425 Mich 870 (1986); and Meda v City of Howell, 110 Mich App 179, 183, 312 NW2d 202, 203 (1981). Accord: Brief of Amici; pg 3, n. 2. See Argument II infra.

On June 10, 1980 the Civil Service Hearing Officer held, and the Civil Service Commission later upheld (J.A. 49-52), that although "Mr. Will was not one of the exemplary candidates in the field" for transfer (J.A. 47), the State Police use of the fact that his brother was indexed to the "red squad" files was a substantial factor in Petitioner not even being considered for a transfer, and this violated the 1963 Michigan constitution's prohibition in art 11, §5, para 6 on the use of "partisan considerations" in civil service transfers (J.A. 57). Petitioner was awarded back pay for the 2 months and 7 days until he had gotten a transfer at the same level to the Michigan Department of Transportation (J.A. 48).

Petitioner did not appeal the

grievance decision nor did the State. On July 22, 1981 the parties accepted the June 10, 1980 grievance decision as the factual premise for the Court of Claims proceedings (that had been joined with the Circuit Court proceedings. (J.A. 31-32)).

On September 10, 1981, Petitioner rejected the check for $201.60 for back pay proffered by the Michigan State Police on August 10, 1981.

In a December 15, 1982 opinion in the Court of Claims case, the judge held that the State is a "person" under 42 USC §1983. (J.A. 59-65). On December 30, 1982 judgment in the Court of Claims was entered against the Michigan State Police defendants.[2] (J.A. 66-68).

After a one-day bench hearing on dam-

---

[2]The Circuit Court case was dismissed by Order of December 30, 1982 for lack of Circuit Court jurisdiction of a claim against the state. Petitioner did not appeal this dismissal by the Circuit Court.

Petitioner could have brought a cause of action for damages under 42 USC §1983 in the Circuit Court against State Police employees in their personal capacities, but he chose not to do so. Petitioner called these employees as witnesses in the Civil Service grievance hearing (J.A. 34, 37, 41, 42, 46, 47).

ages, the Court of Claims judge gave his opinion orally from the bench (J.A. 69-77) on March 8, 1983, then proceeded to award $153,232.14 damages in favor of Petitioner (J.A. 78-79).

In an appeal of right on the §1983 issue, the Michigan Court of Appeals on July 9, 1985 reversed the Court of Claims opinion, and held that the State is not a "person" under §1983 (App. to Pet. for Cert. 132a), but remanded to the Court of Claims for a determination of the liability of the Director of the Michigan

State Police in his official capacity (App. to Pet. for Cert. 133a). The Court of Appeals panel made a significant reduction in the damages awarded. (App. to Pet. for Cert. 134a-135a.)

On August 7, 1987, the Michigan Supreme Court, by a 4-2 decision, held that "the State is not a 'person' for purposes of a damage suit under §1983" (App. to Pet. for Cert. 9a) and that "A state official, when sued in an official capacity, is not a 'person' for purposes of a damage suit under §1983." (App. to Pet. for Cert. 9a). Two Justices joined in a detailed rationale (App. to Pet. for Cert. 18a-54a). Rehearing was denied on October 17, 1987 (App. to Pet. for Cert. 2a).

The petition for writ of certiorari was granted on April 18, 1988.

SUMMARY OF ARGUMENT

In order to determine the intent of the lawmakers, it is necessary to examine the words of §1 of the 1871 Civil Rights Act as well as the purposes of the law, the context, and the circumstances under which the words were employed. All of these factors support the conclusion that the 42d Congress did not intend to include states within the meaning of the word "person" and did not intend to subject states to this federal cause of action for damages in the states' own courts.

The mere use of the word "person" does not imply that states are to be included within the Act's ambit because it is a principle of statutory construction that in common usage the term "person" does not include the sovereign. The Dictionary Act

of the 41st Congress, Third Sess (February 25, 1871) was enacted two months before the 1871 Civil Rights Act and initially included "bodies politic and corporate" in the definition of "person", but was retroactively clarified in R.S. 1 to mean only "partnerships and corporations". This clarification was specifically designed to prevent application of the word "person" to state governments. The clarified meaning of the word "person" included local government units such as municipal corporations because they were "corporations" created by acts of their sovereign states. States were excluded because they were not "corporations", but were sovereign public bodies duly organized and admitted to the union.

The purpose of §1 of the 1871 Civil Rights Act was to permit a federal court action to protect federal rights, because state courts were being used to harass and injure individuals due to the inability or unwillingness of state authorities to protect constitutional rights or to punish violators.

Reconstruction brought about a basic alteration in the federal system, with the federal government established as the guarantor of the basic federal rights of individuals, but a deep respect for the sovereignty of the states was still the norm, with the federal government intruding only when state or local officials refused or were unable to enforce the laws. Had the 42d Congress intended to subject the states to federal

causes of action for damages either in the federal courts or in their own state courts under §1, it would have meant a radical change in the law as it was then understood.

In Quern v Jordan, 440 US 332, 343 (1979), this Court noted that members of the 42d Congress were well aware of the "importance of the states' traditional sovereign immunity" and observed that the absence of any mention of financial consequences to the states or of overriding the 11th Amendment is a "significant indication" of the legislative intent not to override the states' 11th Amendment immunity from suit in the federal courts.

Since Quern held that §1 does not override the states' 11th Amendment

immunity and the states therefore may not be sued in the federal courts, the question in the instant case is whether the 42d Congress intended to include the states within the meaning of the word "person" in §1 and to subject the states to this federal cause of action for damages in the states' own courts. There is nothing to be found from the sponsors or those speaking in favor of §1 to indicate that Congress had any such intention.

Given the common usage of the word "person", as well as an understanding of the context, the purposes of the law, and the circumstances under which the statute was enacted, it simply defies logic to believe that a Republican Congress in 1871 would enact, and a Republican president

would sign into law, a bill that would provide individuals with a cause of action to seek damages from the predominantly Republican state governments in the South in their own state courts while maintaining the prohibition against such actions in the federal courts.

If Congress today wishes to make the states civilly liable for damages on a federal cause of action under 42 USC §1983 it need only enact a definition of "person" that includes the states, and abrogate the states' sovereign immunity from suit. The fact remains that although Congress could have done so in 1871, it simply did not.

ARGUMENT

I.

THE 42D CONGRESS DID NOT INTEND THE WORD "PERSON" IN §1 OF THE CIVIL RIGHTS ACT OF 1871 TO INCLUDE THE STATES.

A. BECAUSE THE ACT DOES NOT EXPRESSLY PROVIDE THAT STATES ARE "PERSONS" IT IS NECESSARY TO INTERPRET THE ACT, AND IN COMMON USAGE THE WORD "PERSON" DOES NOT INCLUDE A SOVEREIGN STATE.

In Monell v Department of Social Services of the City of New York, 436 US 658, 669, 689 fn 53 (1978), this Court found it "necessary" to interpret §1 of the Act because the Act itself "does not state expressly that municipal corporations come within its ambit" and because "there is no express reference in the legislative history to the definition of 'person'". The same difficulties exist in the instant case and the Court should apply the principles enunciated in

District of Columbia v Carter, 409 US 418, 420 (1973), in concluding that the District of Columbia is not a "state":

> "...'[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'"

Furthermore, because this case involves the possible application of a federal statute to a sovereign state, another important principle applies. In a case in which the Court held that the State of Iowa was not intended to be included within the meaning of "person" in relation to a 145-year-old statute concerning the burden of proof in a land dispute, the Court said in an 8-0 opinion:

> "'[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'...Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage....There is nevertheless 'no hard and fast rule of exclusion,'...and much depends on the context, the subject matter, legislative history, and executive interpretation." (citations omitted) (brackets in opinion). Wilson v Omaha Indian Tribe, 442 US 653, 667 (1979).

B. THE DICTIONARY ACT, 16 STAT 431, CH 71, DID NOT INCLUDE THE STATES WITHIN THE MEANING OF THE WORD "PERSON" IN THE CIVIL RIGHTS ACT OF 1871.

The present Chief Justice said in Monell v Department of Social Services of the City of New York, 436 US 658, 719 (1978) (dissent) that

> "Any analysis of the meaning of the word 'person' in §1983, which was originally enacted as §1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat 13, must begin...with the Dictionary Act."

The Dictionary Act was introduced in the 41st Congress, 3d Session, in 1871, to give guidance to a codification commission authorized by the 39th Congress to revise and consolidate the statutes of the United States. The Dictionary Act became law on February 25, 1871, and said in §2 in pertinent part:

"That in all acts hereafter passed ...

> the word 'person' may[3] extend and be applied to bodies politic and corporate ... unless the context shows that such words were to be used in a more limited sense; ...".

The Commissioners were required to "suggest to Congress such contradictions, omissions and imperfections" and "the mode in which they have reconciled, supplied, and amended the same". 14 Stat 74, ch 140, §3 (1866).

To make clear what had really been meant by the 41st Cong, 3d Sess, in the Dictionary Act, the Commissioners substituted "partnerships and corporations" in their revision for "bodies politic and corporate", saying:

---

[3]The Court in Monroe v Pape, 365 US 167, 191 (1961), noted that "this definition is merely an allowable, not a mandatory one." The Court in Monell v Department of Social Services of the City of New York, 436 US 658, 689 n. 53 (1978) interpreted "may" to mean "shall".

"Substantially the same as section 2 of the Act of February 25, 1871, ch. 16, Stat. at L., substituting at the commencement the words 'In *** 1871,' for 'That in all acts hereafter passed;' also, substituting the words 'partnerships and corporations' for 'bodies politic and corporate.' The reasons for the latter change are that partnerships ought to be included; and that if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, and should be understood to include a government, such as a State, while 'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, & c, appear to be excluded."

> Revision of the United States Statutes as drafted by the Commissioners Appointed for That Purpose. In Two Volumes. As Bound for Examination by the Committee of the House of Representatives of the Forty-Second Congress on the Revision of the Laws, p. 19 (1872).

Under 17 Stat 579, ch 24, §3 (Mar 3, 1873), the House Committee on the Revision

of the Laws "employed Mr. Durant, a lawyer of this city, to take this work and go over it and expunge from it everything in the nature of change; anything that altered the law in any particular from what it stood upon the statute-book. Mr. Durant went over the work for that purpose, and also arranged it in form to be presented as a bill before the House." 2 Cong Record, Part 1, 43d Cong, 1st Sess, 819 (Jan 21, 1874) (Sen. Poland). Mr. Durant retained the language "partnerships and corporations" substituted by the Commissioners for "body politic and corporate", and included it in HR 1215, 43d Cong, 1st Sess, that was enacted into law on June 22, 1874, and that was published under the provisions of 18 Stat 113, ch 333 (1874), as §1 of the

Revised Statutes (1st ed 1874), and §1 of the 2d edition of 1878[4], reading as follows:

> "In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February Twenty-fifth, Eighteen Hundred and Seventy-One, ... the word 'person' may extend and be applied to partnerships and corporations, ... unless the context shows that such words were intended to be used in a more limited sense; ...".

The Revised Statutes in §1 said that the clarified wording extended to "any act ... of Congress passed subsequent to February Twenty-Fifth, Eighteen Hundred and Seventy One ...". The Civil rights Act of 1871 was passed on April 20, 1871.

---

[4]"[T]he printed volume [2d ed] shall be legal and conclusive evidence of the laws and treaties contained therein ...". 19 Stat 268, 269, ch 82, §4 (Mar 2, 1877).

C. IN 1871 CONGRESS DID NOT GENERALLY INTEND THE WORD "CORPORATION" TO INCLUDE STATES.

To the Congressmen of the Reconstruction era, a "corporation" was a creature of government, an artificial being, existing only in contemplation of law.[5]

This meaning of "corporation" included those entities that the Court in Monell v Department of Social Services of the City of New York, 436 US 658, 690 n. 54 (1978), called "Local government units which are not considered part of the State for Eleventh Amendment purposes", for the reason these "local government units" were

---

[5]E.g.: Liverpool Insurance Co v Massachusetts, 77 US (10 Wall) 566, 574 (1871); Paul v Virginia, 75 US (8 Wall) 168, 181 (1869); and 2 J. STORY: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1687, p. 522 (3d ed 1858).

associations or communities of individuals (i.e. "corporations") created by acts of their sovereign states.[6]

By the standards of the Reconstruction era a state was not a "corporation", but was "a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." Texas v White, 74 US (7 Wall) 700, 720-721 (1868).[7]

---

[6]E.g. Cowles v Mercer County, 74 US (7 Wall) 118, 121 (1868) (county); Owen v City of Independence, Missouri, 445 US 622, 639-645 (1981) ("municipal corporations".); Northwestern Fertilizing Co v Hyde Park, 18 F. Cas. 393, 394 (No. 10,336) (CC ND Ill 1873) (municipality); and 23 Op. Att'y Gen. 428, 430 (Mar 26, 1901) ("The word 'corporations' [in R.S. 1] may include municipal as well as private corporations. Hence the word 'person' may apply indifferently to either.")

[7]Accord: Scott v Jones, 46 US (5 How) 342,

This understanding of "state" is that which was used by most of the Congressmen who discussed "what is a state" in the debate on the 1871 Civil Rights Act. See: Representative Perry, Cong. Globe, 42d Cong, 1st Sess, ["Globe"] App 80 (March 31, 1871) (Using as the primary meaning the meaning given in "Texas vs. White, 7 Wallace, 720-721."); Representative Burchard, Globe App 314-315 (April 6, 1871) ("the whole body of the people, organized for political purposes

---

376 (1847); The President, Directors, and Company of the Miners' Bank of Dubuque v State of Iowa, 53 US (12 How) 1, 6 (1851); 1 J. KENT: COMMENTARIES ON AMERICAN LAW 349 n. (c) (11th ed. Comstock, p 374, 1867); and A. CONKLING: A TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES 139 (1864). See: Lowenstein v Evans, 69 F 908, 911 (DSC 1895) ("The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator.").

under a government to which powers have been delegated to act for and in the name of the whole."); Representative J. M. Leach, Globe 482 (Apr 5, 1871) ("It is a government, not a mere legislative body empowered to enact laws; it is a trinity: the legislative, the judicial, and the executive; these three are one, the State."). Senator Edmunds, however, in a discussion of the 14th Amendment, said that "A State is a corporation; ...". Globe 696 (Apr 14, 1871).[8]

---

[8]Senator Vickers, to whom Petitioner makes reference on page 17 of his brief, opposed the bill. He argued that a State was a "body politic and corporate" in the sense of "what is a state", rather than in the sense of a state being included as a "person" within the bill. He was really objecting that one "body politic and corporate" [the federal government] cannot say of another "body politic and corporate" [the states] that the other "body politic and corporate" is not performing its duty to its own citizens. Globe at 661-662.

D. THERE IS NO INDICATION FROM THE PURPOSE, THE SUBJECT MATTER, OR THE CONTENT OF THE CIVIL RIGHTS ACT OF 1871, IN THE CONTEXT OF "THE EVENTS AND PASSIONS OF THE TIME AT WHICH IT WAS ENACTED",[9] THAT THE STATES WERE TO BE INCLUDED WITHIN THE MEANING OF "PERSON".

When Andrew Johnson became President on April 15, 1865, six days after Lee's surrender, Congress was in adjournment until December 4, 1865. Johnson's attitude was that "white men alone must manage the South."[10] The only major Congressional opposition in 1865 came from the "Radical Republicans", a minority who wanted black suffrage as a condition for the readmission of the former rebel states.[11]

---

[9]District of Columbia v Carter, 409 US 418, 425 (1973).

[10]E. FONER: RECONSTRUCTION AMERICA'S UNFINISHED REVOLUTION 1863-1867, 180 (1988).

[11]Id at 178-179, 228-239 (1988).

Johnson's plan began to unravel, and opposition began to grow, as southern planters and former confederate leaders gained prominence in state governments, withheld political rights from the freedmen, denied them education, and enacted "Black Codes" that sought to coerce and control black labor and to put heavy political and personal restraints on blacks.[12]

Johnson continued to alienate Congress in 1866 by vetoing an extension of the Freeman's Bureau, entering into an impromptu 1866 Washington's Birthday

---

[12]E.g.: K. M. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877, 79-80, 102 and 110 (Vintage Books 1965). H. CARTER: THE ANGRY SCAR 52-54 (1959). W.E.B. DUBOIS: BLACK RECONSTRUCTION IN AMERICA 166-180 (1956). E. FONER, supra note 10, at 198-205, 207, 210, 214 and 225-227. Slaughter-House Cases, 83 US (16 Wall) 36, 70 (1873).

tirade against the Radical Republican leaders,[13] and vetoing the Civil Rights Bill of 1866, whose §2, when the veto was overridden, became the model for §1 of the Civil Rights Act of 1871.[14]

To try to put the fruits of the civil war (including the Civil Rights Bill of 1866 and the Freedman's Bureau Bill)[15] out of the reach of vetoes and shifting political majorities, and to "remove any vestige of doubt regarding power of the national government to protect the rights of Negroes and southern loyalists"[16]

---

[13]K. M. STAMPP, supra note 12, at 112-113; E. FONER, supra note 10, at 249; H. CARTER, supra note 12, at 52-54.

[14]Quern v Jordan, 440 US 332, 341 n. 11, 362 n. 17 (concur in judg.) (1979).

[15]J. ten Broek: Equal Under Law (1965).

[16]H. J. Graham, Our "Declaratory" Fourteenth Amendment, 7 Stanford L Rev 3, 18 (1954).

Congress proposed a 14th Amendment on June 13, 1866.

As said by Professor Eric Foner in his recent RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988):

> "Yet if a degree of federal intervention in state affairs scarcely concedable before 1860 now became possible, few Republicans wished to break completely with the principles of federalism. Only if state governments failed to protect citizens' rights would federal action become necessary.... Most Republicans assumed the states would retain the largest authority over local affairs- in this, they followed the path marked out by the Civil Rights Act. But there was an important difference. The Fourteenth Amendment can only be understood as a whole, for while respecting federalism, it intervened directly in Southern politics, seeking to conjure into being a new political leadership that would respect the principle of equality before the law." pg 259.

President Johnson's denouncement of the proposed 14th Amendment plus a haranguing tour of the North by Johnson in

August and September of 1866, only exacerbated the split between the President and Congress.[17]

When Congress reconvened in December of 1866 with a more than 2/3 majority of Republicans, most of them anti-Johnson,[18] the Radicals seized the initiative,[19] with the moderate Republicans in Congress joining with the Radicals to produce state governments in the South that would seek to respect black suffrage, and seek to protect the rights of the freedman and of sympathetic whites.[20]

"[M]ost Republicans still believed the

---

[17]E. FONER, supra note 10, at 264-265.

[18]K. M. STAMPP, supra note 12, at 117; E. FONER, supra note 10, at 267.

[19]E. FONER, supra note 10, at 273.

[20]E. FONER, supra note 10, at 277-278.

states retained rights beyond the scope of federal intervention, and expected the relatively rapid return of the Southern states as equal members of the Union."[21]

On March 2, 1867, the former rebel states were divided by Congress into military districts, 14 Stat 428, ch 153. On July 19, 1867, Congress stated that Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia did not have legal state governments, hence they were subject to the military commanders and to "the paramount authority of Congress." 15 Stat 14, ch 30 (Tennessee had been "restored" on July 24, 1866 (Joint Resolution 73, 14 Stat 364)).

---

[21]E. FONER, supra note 10, at 277.

Having later met Congressional standards for readmission, the remaining rebel states were admitted with Reconstruction governments in 1868 and 1870.

In 1868 the Republicans came to power in most of the South,[22] and on March 4, 1869, Republican Ulysses S. Grant took the oath of office as President.

"Republican politics never escaped a 'colonial' pattern. Unable to establish their legitimacy in the eyes of powerful opponents, the new governments' survival ultimately rested on federal support."[23]

---

[22]E. FONER, supra note 10, at 346. Amicii' argument I.B.1, pp 14-17, does not mention the transition in the governments of the former rebel states that is outlined in this brief.

[23]Id at 377.

These Republican state governments faced opposition not only from Southern Democrats who were seeking with varied success to wrest control,[24] but they also had to face the Ku Klux Klan and similar organizations.[25] The Klan was fighting a revolution, but the Republican state governments tried to achieve "stability through conciliation."[26]

Several of the former rebel states had passed anti-Ku Klux Klan laws,[27] but they were ineffective and enforcement was impossible. "[A] wave of murders and assaults were launched against both blacks

---

[24]Id at 421-425, 440-442.

[25]Id at 342-343, 425-444, 454-459.

[26]Id at 444.

[27]Id at 438.

and Union sympathizers." District of Columbia v Carter, 409 US 418, 425 (1973).

Congress reacted with the "Force Acts". On May 31, 1870, the First Force Act, 16 Stat 140, ch 114, sought to guarantee the voting privilege to blacks in the Southern States with penalties for obstructing that right. Control was put in the U.S. Courts, with the President authorized to employ the land and naval forces. Section 18 of the 1870 First Force Act reenacted the Civil Rights Bill of April 9, 1866 (14 Stat 27, ch 31). See, also §§16 & 17.[28]

Nothing changed. Masses of reports came to President Grant from military

---

[28]Civil Rights Cases, 109 US 3, 16 (1883); and L. TRIBE: AMERICAN CONSTITUTIONAL LAW 332 n. 11 (2d ed 1988).

officers in the South. Southern Governors and other civil officials appealed to the President. Petitions and sworn accounts were received by the President and forwarded to Congress.[29]

These reports brought forth a second "Force Act" on February 28, 1871 (16 Stat 433, ch 99), that amended and strengthened the First Force Act of May 31, 1870, particularly by strengthening enforcement powers in larger cities.

"Thus, at the opening of the 42d Congress [March 4, 1871], considerable apprehension was expressed by Republicans about the insecurity of life and property in the south...". District of Columbia v

---

[29]Cong. Globe 41st Cong, 3d Sess 146 (Dec 16, 1870); and S. Exec. Doc. 16, 41st Cong 3d Sess (Part 1, Jan 13, 1871) (Part 2, Jan 17, 1871).

Carter, 409 US 418, 425 (1973).

The Court has succinctly described the conditions that existed:

> "[S]tate courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." Mitchum v Foster, 407 US 225, 240 (1972).
>
> "... §1 of the Act ... was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others."
>
> "... the remedy created in §1 'was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" (emphasis in opinion). District of Columbia v Carter, 409 US 418, 426 (1973).
>
> "Congress enacted §1983 in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers." Felder v Casey, 56 USLW 4689, 4694 (U.S. June 22, 1988) (No. 87-526).

President Grant was skeptical of using the army to enforce racial justice, and he did not want to be charged with being a military dictator. The Congressional managers of legislation concluded that they could not put through any legislation relating to social justice without a strong call for it by the President.[30]

While President Grant was on his way by carriage to Capitol Hill to tell leading Congressmen that he could not endorse legislation that might result in the use of troops for its enforcement, George Boutwell, the Secretary of Treasury, tried to dissuade him. This effort, coupled with the recitations of

---

[30]W. S. McFEELEY; GRANT: A BIOGRAPHY 369 (1981); A. W. TRELEASE, WHITE TERROR 387-388 (1971).

atrocities Grant heard at the Capitol, caused Grant to send a message on March 23, 1871, in which he asked for special help for the Restoration governments:[31]

> "A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.
>
> Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States...".

"Such legislation was deemed essential in light of the inability of the state

---

[31]W. S. McFEELEY; GRANT: A BIOGRAPHY 369 (1981); and 2 G. S. BOUTWELL: REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (1902). See, Monroe v Pape, 365 US 167, 172-173 (1961).

governments to control the situation. Five days later, Mr. Shellabarger of Ohio introduced the bill that eventually was to become the Ku Klux Klan Act [Third Force Act, or Civil Rights Act] of 1871." District of Columbia v Carter, 409 US 418, 426 (1973). The bill became law on April 20, 1871. 17 Stat 13, ch 22 (1871).

Although this volatile period of American history was a time of great turmoil and significant change, there is nothing in "the events and passions of the time" to indicate that Congress intended the 1871 Civil Rights Act to include states within the definition of "person" and to permit lawsuits against states in state courts.

E. THE LEGISLATIVE HISTORY OF §1 OF THE CIVIL RIGHTS ACT OF 1871 DOES NOT DEMONSTRATE ANY AFFIRMATIVE INTENT TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON", OR TO ABROGATE THE STATES' TRADITIONAL IMMUNITY IN THEIR OWN COURTS.

The Court has repeatedly pointed out that the purpose of §1 of the Civil Rights Act of 1871 was to open the doors of the federal courts to protect federal Constitutional rights.[32] Felder v Casey, 56 USLW at 4694.

The Court unanimously agreed in Kentucky v Graham, 473 US 159, 169 n. 17 (1985), that

> "The Court has held that §1983 was not intended to abrogate a State's Eleventh Amendment immunity. Quern v Jordan, 440 US 332 [345] (1979) ...".

---

[32]"At the time this [1871] Act was adopted, it must be remembered, there existed no general federal-question jurisdiction in the lower federal courts. Rather, 'Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws.'" District of Columbia v Carter, 409 US 418, 427-428 (1973).

As the Court in Quern v Jordan, 440 US 332, 345 (1979) pointed out in its opinion, the Civil Rights Act:

> " ... does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the states; nor does it have a history which focuses directly on the question of state liability and which shows that congress considered and firmly decided to abrogate the eleventh amendment immunity of the states." Quern, supra, 440 US at 343, 342, 345.

Thus, since the doors of the federal courts were not opened by the 42d Congress in §1 to causes of action for damages against the State, and since state liability was not a focus of the debates, what Petitioner must find in the legislative history is an explicit affirmative showing of an intent by the 42d Congress to subject the states to a federal cause of action for damages in the states' own courts. There is no such

showing because it is not there to be found.

Professor Zagans made an in-depth analysis of every reference in the Congressional debates to §1, and found that

> "Debate on the bill was extensive. Over one hundred members of both houses presented speeches, most of them opposing passage. Only twenty-eight speakers, less than one-third of those addressing the Act, mentioned section 1. Of those, about half opposed the section; four who opposed the bill in general nonetheless approved of section 1." Zagans: "Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability, 71 Va L Rev 499, 549-550 (1985).

The legislative history has already been thoroughly examined in Monroe v Pape, 365 US 167 (1961); Monell v Department of Social Services of the City of New York, 436 US 658 (1978); and Quern v Jordan, 440 US 332 (1979).

Two extensive scholarly analyses (that do not rely on the Dictionary Act) have concluded that "person" in §1 did not include the states.

> Nowak: The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Columbia L. Rev 1413, 1464-1468 (1975).
>
> "At several times in the debates Congressman referred to the proposed legislation as punishing both individuals and states. Many of these statements, when taken out of context, might indicate that state governments were to be held financially responsible under what is now section 1983. However, when the speeches and debates are read in full, it becomes apparent that there was no such intention.... The proponents of the bill claimed that it was necessary to make state officers, and some private individuals, both criminally and civilly liable because those individuals were being left free to deprive innocent individuals of the rights protected by the Constitution. All of their defense of the bill relates to the necessity of punishing these individuals despite the fact that they often used language indicating 'the state'

> should be punished or held responsible." 75 Columbia L Rev at 1465-1466.
>
> "There is no indication that state governments were to be held civilly liable under what is now section 1983. Indeed Representative Bingham['s] ... final conclusion that the federal government could punish men and not states for a violation of its laws [Globe, App 85-86 (March 31, 1871)] seems to be of general application." 75 Columbia L Rev at 1467. Accord: Developments in the Law, Section 1983 and Federalism, 90 Harv L Rev 1133, 1155-1156 (1977).[33]

There is nothing from those legislators who spoke in favor of §1 to indicate that there was ever the slightest intention for §1 to include the states within the meaning of "person"; or to abrogate the states' immunity from suit in their own courts. What little relevant evidence exists seems to indicate that

---

[33]Two extensive law review articles concluded that a state was a "person", but their methodology is negated by the fact that they relied on the Dictionary Act of February 25, 1871, without making any mention of its

Congress was concerned more with individuals than the states themselves.

For example, Representative Coburn, a Republican lawyer from Indiana, spoke of "terror, deceit, conspiracy, whipping, burning, torture, murder" (Globe, 456); said that "the offenders are not arrested, put on trial, or punished" (Globe, 457); gave long examples of outrage (Globe, 457-458); and argued that "The States cannot or do not act" (Globe 459). He then discussed towards whom the corrective action should be taken:

---

subsequent clarification. Englander: Amenability of States to Section 1983 Suits: Reexamining Quern v Jordan, 62 Boston U.L. Rev. 731, 736-741, 751-759 (1982); and McBirney: Quern v Jordan, A Misdirected Bar to Section 1983 Suits Against States, 67 Calif L. Rev. 407, 422-427 (1979). The same would be true for the conclusion in Della Grotta v State of Rhode Island, 781 F2d 343, 348-349 (CA 1 1986), that also relied on the Dictionary Act without mentioning its clarification.

> "Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments. To punish a particular individual is less troublesome than to set aside a whole State government, declare martial law, suspend the writ of habeas corpus, and substitute, generally, national for State authority. Can this be done? Or must the nation in every case of this kind deal with the State alone? Must we allow outrages to proceed till State authority is prostrated. It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable, and that the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the conditions of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government." Globe, 459 (April 4, 1871).

The others who spoke in favor of §1 were all Republicans and all lawyers: Representative Shellabarger, Globe App 68 (March 28, 1871); Representative Maynard,

Globe App 310 (March 30, 1871); Representative Lowe, Globe 374-376 (March 31, 1871); Representative Perry, Globe App 79 (March 31, 1871); Representative Wilson, Globe 481-482 (April 5, 1871); Representative Burchard, Globe App 312 (April 6, 1871); and Senator Edmunds, Globe 568 (April 11, 1871).

Nothing in Petitioner's brief demonstrates any Congressional intent to include states as "persons" or to override the states' immunity from suits in their own courts. Petitioner's legislative history arguments are either inconclusive or taken out of context and certainly do not demonstrate "explicitly and by clear language ... a history which focuses directly on the question of state liability and which shows that Congress

considered and firmly decided" to impose liability on states. Quern, supra, 440 US at 345.

Representative Shellabarger, a Republican lawyer from Ohio, was a member of the Joint Committee of 10 that prepared the legislation. He was the Representative who introduced the bill in the House. His comments concerning §1 on the introduction of the bill are directed almost exclusively to the authority of Congress to enact the legislation. The quotations from Representative Shellabarger which appear on page 12 of Petitioner's brief come from the Representative's discussion of §2 of the Act, not §1, with which we are concerned in this case.

Petitioner refers at footnote 9 on

page 14 of his brief to Representative Sheldon, but taken in its proper context, the reference is not to "the positive act or the default" of states, but of "state authorities". Globe 367-368 (Mar 31, 1871). The same footnote 9 refers to Representative Dawes who discussed §1 only in terms of individuals being taken into federal court, i.e. "him" or "he", not of states. Globe 476 (Apr 5, 1871). The remaining reference in Petitioner's footnote 9 is to one page of the six pages where Representative Garfield was speaking of the equal protection of the laws and how they can be enforced. In a passing reference to §1, he said:

> "This is a wise and salutory provision, and plainly within the power of Congress. Globe App. 153 (Apr 4, 1871).

Petitioner's other reference to Representative Garfield is at page 11 of

his brief in relation to the 14th Amendment, but the quotation is merely a part of Representative Garfield's long description of the added power given to Congress by the 14th Amendment as enacted, when compared with an earlier version that was rejected. Globe App. 150-153 (Apr 4, 1871).

The quote from Senator Edmunds at the top of page 13 in Petitioner's brief is from an extensive debate the Senator was having with Senator Thurman, who opposed the bill, on the authority of Congress to enact the bill. Senator Edmunds asked rhetorically how the 14th amendment was to be enforced, and said in part as the positive alternative:

> "Or, are you going to do it, as we by this bill do it under the fourteenth amendment, by declaring that ANY MAN who infracts that article shall be punished." Globe 696, (Apr 14, 1871) (emphasis added).

The last quote of Senator Edmunds by Petitioner is from the Senator's defense of the Sherman Amendment, which was later defeated.

On page 15 of his brief, Petitioner left out part of the quotation from Senator Boreman. The part left out is emphasized:

> "Would it not be the merest mockery to say that the citizens of any portion of this country, or the people residing in any portion of this country, had guarantied [sic] to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights to carry out the guarantee, to enable to them to enforce those rights? WHILE A POWER OF THIS SORT MAY LIE DORMANT SOMETIMES, AND WE MAY FIND THAT ONE WHO HAS BEEN INJURED AND WHO HAS BEEN DAMAGED CANNOT FIND ON THE STATUTE-BOOK A REMEDY PROVIDED, YET THE POWER IS THERE, AND IT ONLY REQUIRES THE ACTION OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT TO BRING IT INTO BEING, to provide the machinery in order that the injured person may secure his rights." Globe App. 229 (Apr 13, 1871).

What the Senator was saying in the part of the quotation left out by Petitioner is what the State of Michigan is arguing in this lawsuit: Congress' power under §5 is not always exercised to its full extent.

Petitioner makes four references to Representative Bingham, but once again leaves out a crucial part of a quotation. The full quotation from Representative Bingham, portions of which are found on pages 13-14 of Petitioner's brief, refers to "state officials" as those from whom relief is to be sought, as shown by the following emphasized words which were left out by Petitioner:

> "... The State never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; BECAUSE ALL STATE OFFICIALS ARE BY THE CONSTITUTION REQUIRED TO BE BOUND BY OATH OR AFFIRMATION TO SUPPORT THE CONSTITUTION. AS I HAVE ALREADY SAID, the States did deny to citizens the equal protection of the laws, ...". (Globe App. 85 (Mar 31, 1871).

Other references to individuals as those against whom relief was to be sought are found in Representative Bingham's six pages of discussion in the Congressional Globe:

> "In such case the nation would inflict the penalty for this crime upon individuals, not upon States." Globe App. 85 (Mar 31, 1871).
>
> "It is clear that if Congress do so provide by penal laws for the protection of these rights, those violating them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law." Globe App. 85-86 (Mar 31, 1871).

The Bingham quotation from page 81 of the Globe Appendix that is found on page 13 of Petitioner's brief is part of a discussion of the power of Congress. The part of the quotation that Petitioner left out says (emphasized):

> "THE QUESTION THEN, SIR, AND THE QUESTION NOW, IS, WHETHER IT IS COMPETENT FOR THE CONGRESS OF THE UNITED STATES, UNDER THE CONSTITUTION

> OF THE UNITED STATES, IN PURSUANCE OF ITS PROVISIONS, AND IN THE EXERCISE OF THE POWERS VESTED BY IT 'IN THE GOVERNMENT OF THE UNITED STATES OR IN ANY DEPARTMENT OR OFFICER THEREOF,' TO PROVIDE BY LAW FOR the enforcement of the Constitution ... on behalf of every individual citizen of the Republic ...". Globe App 81 (Mar 31, 1871).

The Bingham quotation from page 83 of the Globe Appendix that is also found on page 13 of Petitioner's brief relating to the powers of the states being limited, and to the powers of Congress being extended, through the 13th, 14th, and 15th Amendments, merely states the truism that Congress had a power that it did not have before the 13th, 14th, and 15th Amendments.

On page 15 of his brief, Petitioner refers to Senator Sumner, no specific quote being given. The discussion by the Senator in the Congressional Globe at

pages 650-651 was a general statement on the nationalization of the concept of equal rights.

Senator Trumbull, quoted twice on pages 14 to 15 of Petitioner's brief, was opposed to the bill, except for §1. The first quote is, again, only an extract that does not give the full import of the argument. Senator Trumbull was speaking only of federal power, not of "the machinery for doing it", as is shown below, with the words left out by Petitioner emphasized:

> "[T]HE FEDERAL GOVERNMENT CANNOT INTERFERE WITH THE STATES SO LONG AS THEY DO NOT DEPRIVE SOME PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW. IF THEY SHOULD, THEN THE POWER IS GIVEN TO THE FEDERAL GOVERNMENT TO correct that violation of the Constitution of the United States. IT MAY NOW prevent any State from depriving any person of life, liberty, or property without due process of law. I AM NOT NOW SPEAKING OF THE MACHINERY FOR DOING IT; BUT THE POWER IS NOW IN THE FEDERAL GOVERNMENT

> UNDER THE FOURTEENTH AMENDMENT TO PREVENT A STATE DOING WHAT NO STATE WOULD UNDERTAKE TO DO WITHOUT A VIOLATION OF ITS OWN CONSTITUTION." Globe 577 (Apr 11, 1871).

The second quote from Senator Trumbull that is found on pages 14-15 of Petitioner's brief is given to try to indicate an approval by the Senator of §1, but examination of the full context of the remarks shows that he was not referring to §1.

Representative Arthur, cited at page 15 of Petitioner's brief, spoke in the wildest hyperbole,[34] claiming that the "southern disorders" were mere allegations

---

[34]"A cursory view of the legislative history of the Act shows opponents virtually apoplectic in their reaction to the legislation." Matascar: Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis, 40 Ark L Rev 741, 780 (1987).

intended by the Republicans "to divert the attention of the people from the abuses of the [Republican] Administration ...". Globe 364 (Mar 31, 1871); and that the pending bill was an "usurpation". Globe 365. Representative Arthur's examples of those subject to §1 were all individuals, i.e. Judges, court officers, legislators, Governors, and sheriffs. Globe 365-366.[35]

Senator Thurman, quoted on page 15 of Petitioner's brief, also spoke in hyperbole, claiming that §1 subjected legislators and judges to a suit in the U.S. District Court. Globe App. 217

---

[35]The Court has cautioned against relying on the opposition when seeking the interpretation of a statute. National Labor Relations Board v Fruit & Vegetable Packers and Warehousemen, Local 760, 377 US 58, 66 (1964). ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

(Apr 13, 1871).

Petitioner claims that Senator Frelinghuysen spoke "in response" to the opponents. In the Senator's comments, the Senator was speaking of Presidential intervention, another aspect of the bill, not of civil damage actions. Globe 501. As the Senator said, following the quote given by Petitioner at page 15:

> "Placing the discretion as to the enforcement of the law with the President, and not with the Governor of a State or with a marshall, I see no peril." Globe 502 (Apr 6, 1871).

The Amici on pages 7-8 of their brief cite Representative Willard for the proposition that the states should be liable for failing to control private misconduct, if anyone was to be liable. Amici do not mention the paragraph that precedes the quotation cited by the Amici. In his

preceding paragraph, the Representative disclaims any Constitutional basis for his remarks.

> "Thus it seems to me - and, as I said before, I am only arguing this point in the light of Justice, and not as a strict question of constitutional law - that we are imposing upon a community ['city, county, parish, or any other subdivision of a State'] an obligation that we have no right to impose upon them, that in justice we cannot impose upon them ...". Globe 791 (Apr 19, 1871).

Petitioner concludes his Argument I.A. on legislative history with the claim that "§1 was intended to provide a remedy coextensive with the rights secured against the states by the Fourteenth Amendment, and that §5 of the Fourteenth Amendment was a sufficient constitutional basis for imposing such liability." But, since the 11th Amendment immunity of the States was not abrogated by §1 of the 1871

Civil Rights Act, it is obvious that §1 of the 1871 Act was not coextensive with the rights secured against the states by the Fourteenth Amendment. Section 1 could have been coextensive, and it can be if Congress chooses to enact legislation including states within the meaning of "person", and abrogating their immunity. But, as has been shown in this brief, the 42d Congress in 1871 did not choose to exercise its full power and include the states within the meaning of "person" in the 1871 Civil Rights Act.[36]

---

[36]In the one hundred seventeen years since the Act's passage, Congress has declined to amend it to provide the relief Petitioner seeks. Two attempts have been made to amend 42 USC §1983 to include states within the meaning of "person". §§2(b) & 2(c)(2), S. 1983, 96th Cong, 1st Sess (Nov 6, 1979), and §§2(b) & 2(c)(2) S. 990, 97th Cong, 1st Sess (Apr 9) (Apr 10), 1981)). The bills never left the Committee. See, N. Sagafi-Nejad, Proposed Amendments to Section 1983 Introduced in the Senate, 27 St. Louis U L. J. 373 (1983).

F. CONCEPTS OF FEDERALISM PREVALENT DURING RECONSTRUCTION SUPPORT THE CONCLUSION THAT THE 42D CONGRESS DID NOT INTEND TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON" OR TO ABROGATE THE STATES' TRADITIONAL IMMUNITY FROM ACTIONS FOR DAMAGES IN THEIR OWN COURTS.

Although Petitioner "readily concedes" that the Eleventh Amendment bars suits against states and officers in their official capacity in the federal courts (Petitioner's brief, p. 8), he devotes several pages of argument to the proposition that the Court's Eleventh Amendment jurisprudence is incorrect (Petitioner's brief, pp. 38-44). Respondents submit, however, that the authorities upon which Petitioner relies do not support his assertions and that the historical theory he espouses has been considered several times, but has never been adopted by a majority of the Court.

Pennhurst State School & Hospital v Halderman, 465 US 89 (1984); Atascadero State Hospital v Scanlon, 473 US 234 (1985); Welch v Texas Department of Highways, 483 US ____; 97 L Ed 2d 389 (1987).

Petitioner spends 13 pages of his brief (Arguments III and IV, pp. 32-44) to set forth the truism that Congress has the power under §5 of the Fourteenth Amendment to provide a federal cause of action against a state that may be exercised only in a state court. Respondents, on the other hand, have never disputed that Congress has such a power, but submit that the 42d Congress in 1871 did not in fact exercise that power in passing the Civil Rights Act.

Petitioner's argument relating to the concepts of federalism and state sovereignty are faulty in at least two respects: It fails to acknowledge important principles of federalism which were accepted by the Members of Congress who passed the 1871 Civil Rights Act and it fails even to recognize the existence of the doctrine of state sovereignty which prohibited suits against states in state courts, a doctrine of which the 1871 Congress was well aware.

At the time the 1871 Civil Rights Act was passed, the "reigning constitutional

theory" of the day was a doctrine of "coordinate sovereignty that ... placed limits on even the enumerated powers of the National Government in favor of protecting state prerogatives." Monell, supra, 436 US at 676; See, United States v Cruikshank, 92 US 542, 549, 550 (1876). Although the Civil War and Reconstruction undoubtedly brought about significant changes in the relationships between the states and the federal government, it nevertheless remained true that members of Congress in 1871 retained a deep respect for the sovereignty of the states. One aspect of this sovereignty was the well-recognized jurisprudential principle that a state may not be sued without its consent. This has been declared to be the

law in the federal courts, Hans v Louisiana, 134 US 1 (1890), and it is even more true in state courts. Beers v State of Arkansas, 61 US (20 How.) 527, 529 (1857):

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other without its consent and permission..."

See also, Bank of Washington v State of Arkansas, 61 US (20 How.) 530 (1857) and Railroad Co v Tennessee, 101 US 337, 339 (1879), where the Court said:

> "The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty."

Major legal treatises of the day also recognized this principle of sovereignty:

> COOLEY'S BLACKSTONE 155, n. 2 (1st ed 1871) ("A government is not liable to be sued in its own courts except by its own consent ...."); 1 J. KENT: COMMENTARIES ON AMERICAN LAW 297 n. (e) (11th ed, Comstock, p 316, 1867) ("A state cannot be sued in its

> own courts without its consent.... This is an attribute of sovereignty and of universal law. ... [N]o citizen of any of the United States ... can sue a state."); and 2 J. STORY: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1687, p 521 (3d ed 1858) ("Thus, many states in the union, which have an interest in banks, are not suable even in their own courts.").

The principle of state sovereignty which prohibits suits against states in state courts is based upon the principle of sovereign immunity which is also exemplified in the Eleventh Amendment. In Quern v Jordan, 440 US 332 (1979), the Court rejected the contention that the 1871 Congress which passed the Civil Rights Act intended to abrogate the states' Eleventh Amendment immunity. The Court recognized that the members of the 42d Congress were fully aware of the "importance of the states' traditional

sovereign immunity", and after examining the words of the statute as well as the "logic, the circumstances surrounding the adoption of the Fourteenth Amendment, [and] the legislative history of the 1871 act" concluded that the Civil Rights Act:

> "... does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the states; nor does it have a history which focuses directly on the question of state liability and which shows that congress considered and firmly decided to abrogate the eleventh amendment immunity of the states." Quern, supra, 440 US at 343, 342, 345.

Section 1 of the 1871 Civil Rights Act was proposed and supported by Republicans for whom federalism was a basic concept and to whom federal action was called for only when state and local authorities failed to protect citizens' rights. If the 42d Congress in 1871 had intended to include the states within the meaning of

"person" in the 1871 Civil Rights Act, or to have the states be subject to an action for damages in their own state courts, they would also have made the states subject to a cause of action for damages in the federal courts by abrogating the states' Eleventh Amendment immunity. The State submits that the words of the statute, as well as the purpose, subject matter, and circumstances surrounding its passage, demonstrate that Congress chose not to provide such a broad remedy. Congress chose instead to provide a cause of action for damages against individuals and local government units acting under color of state law, but they chose not to include the states within the meaning of "person", not to abrogate the Eleventh Amendment immunity of the states in the

federal courts, and not to abrogate the immunity of the states from actions in their own state courts.

G. THIS COURT'S PRIOR DECISIONS DO NOT SUPPORT PETITIONER.

Petitioner's Argument concerning Monell does not distinguish between the sovereign states and their non-sovereign local governmental units, nor does it mention the rule from the decision of the Court pertaining to the State of Iowa in Wilson v Omaha Indian Tribe, 442 US 653, 667 (1979), that

> "'[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'" (brackets in opinion).

Furthermore, many of the cases Petitioner cites are misstated or incomplete and because this Court has never specifically addressed the question whether a State is a "person" for purposes of §1983, much of Petitioner's argument is based upon his inferences from what the

Court has not said in previous decisions. Such inferences are inappropriate since they disregard the principle expressed in Hagans v Levine, 415 US 528, 535 n. 5 (1974), that when questions have been passed on in prior decisions sub silentio, the Court is not bound when a subsequent case squarely presents them. The State submits that nothing in the Court's prior decisions compels the results Petitioner seeks.

In Lake County Estates v Tahoe Regional Planning Agency, 440 US 391 (1979), both California and Nevada filed briefs indicating that the Planning Agency was a political subdivision rather than an arm of either state. 440 US at 401. The Court clearly pointed out at page 401 that it was treating the Planning Agency as a

"political subdivision such as counties and municipalities".

Martinez v State of California, 444 US 277 (1980) (also cited in the Amici brief, pg 10, n. 21), had nothing to do with a §1983 cause of action against the State. Of the 5 causes of action in the lawsuit, two were common law actions against the state, and one (No. 5) was under §1983 against state employees in their individual capacities. 85 Cal App 3d 430, 434-436, 149 Cal Rptr 519, 522-523 (1978). The question presented to the Court, as set out in both the Appellant's jurisdictional statement at page 5, and the Appellant's brief at page 4, was "Whether State Officials Have Absolute Immunity From Civil Liability In An Action Brought Pursuant to 42 U.S.C. §1983, For

Acts Which Caused a Loss of Life."

Maine v Thiboutot, 448 US 1 (1980) (similarly cited at pg 10, n. 19 & n. 21, of the Amici brief), was an administrative appeal against the State of Maine and the Commissioner of the Maine Department of Human Services which included an allegation under 42 USC §1983 in an amended complaint. The lower court ordered retroactive benefits for the Thiboutots, but denied retroactive benefits for the class and denied attorney's fees without specifying whether it was granting relief in response to the administrative appeal or to the §1983 count. The Thiboutots appealed. The State and the Commissioner did not appeal. 405 A2d 230, 232, 235, 238 (Me 1979).

The Supreme Judicial Court of Maine

held that state and federal courts have concurrent jurisdiction over cases under 42 USC §1983 (402 A2d at 235); that 42 USC §1983 covered violations of federal law as well as violations of the federal Constitution (405 A2d at 236); and that retroactive benefits for the class sought in the State court under federal law were barred by the state's "sovereign immunity" (405 A2d at 236-237). The Supreme Judicial Court of Maine held additionally that since the trial court had also awarded prospective relief, the plaintiffs had prevailed on a claim which was cognizable under 42 USC §1983, even though the court had not indicated that §1983 was the basis for judgment, hence the plaintiffs could be entitled to attorney's fees under 42 USC §1988, because 42 USC

§1988 was an action by Congress under §5 of the 14th Amendment abrogating the states' immunity. The Court affirmed, 448 US 1 (1980).

Kentucky v Graham, 473 US 159 (1985), held that fees could not be recovered from the state when state officials were prevailed against for damages in their personal capacities. 473 US at 167.

Edelman v Jordan, 415 US 651 (1974), was explained in Quern v Jordan, 440 US 332, 339 n. 8 (1979), as being decided on the basis that Ex parte Young, 209 US 123 (1908), permits enjoining state officials to conform their future conduct to the requirements of federal law; and that Ex parte Young permits prospective injunctive relief, but not a retroactive award which requires the payment of funds from the

state treasury.

Alabama v Pugh, 438 US 781 (1978), held that the 11th Amendment bars a §1983 action against the State. Implied from the language of the short opinion is the principle that if the state waives its immunity from suit in a federal court, thus giving the federal court a jurisdiction it would not otherwise have, the next question for the federal court would be whether a complaint under §1983 against the state sets forth a claim upon which relief can be granted. That is, once the hurdle of jurisdiction has been jumped, there still remains the hurdle of whether the 42d Congress intended to include the states within the meaning of "person" in §1 of the Civil Rights Act of 1871.

Of Hutto v Finney, 437 US 678 (1978), the Court in Kentucky v Graham 473 US 159, 170 (1985), said:

> "Hutto holds only that, when a State in a §1983 action has been prevailed against for relief on the merits, either because the State was a proper party defendant or because state officials properly were sued in their official capacity, fees may also be available from the State under §1988."

Hutto, as explained in Kentucky v Graham, is contingent upon the State being a "proper party defendant". This leaves open the question of when, if ever, is the state a "proper party defendant" in a §1983 action. The answer is -- not until Congress changes the meaning of "person" to include the states and also abrogates the states' sovereign immunity. As shown in this brief, Congress did not intend in 1871 to include the states within the meaning of "person" in §1 of the Civil

Rights Act or to abrogate states' immunity.

II.

A CAUSE OF ACTION UNDER §1 FOR DAMAGES AGAINST A STATE OFFICER IN THE OFFICER'S OFFICIAL CAPACITY IS A CAUSE OF ACTION AGAINST THE OFFICE, NOT AGAINST THE PERSON OF THE STATE OFFICER, HENCE IT IS A CAUSE OF ACTION AGAINST THE STATE, WHICH IS NOT A "PERSON".

Although it is undisputed that Petitioner could have sued the Director of the State Police under §1983 for damages in his individual capacity, Petitioner chose not to do so. In this action for damages only, Petitioner agrees at page 28 of his brief that the action was against the Director of State Police "in his official capacity". The Michigan Supreme Court had so found. App. to Pet. for Cert. 9a & 47a-48a.

Since 1838, the Court has held that an action against a governmental officer by his style of office, when a claim is made

against the officer entirely in the officer's official character or capacity, is an action against the governmental entity, not against the officer personally; that is, the action is against the office, not against the person. Governor of Georgia v Madrazo, 26 US (1 Pet) 110, 123-124 (1838):

> "The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially.
>
> The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record.
>
> The decree is not to be considered as made in a case in which the governor was a defendant, in his personal character; nor could a decree against him, in that character, be supported."

Consistent with this concept that an action against a state officer in the state officer's official capacity is an action against the state office (the legal entity) held by the state officer, are a series of decisions since 1945 in which the Court has stated that an action for the recovery of money damages from a state officer in the state officer's official capacity is not an action against the state officer personally, but is an action against the state itself.

Ford Motor Company v Department of Treasury of the State of Indiana, 323 US 459, 463-464 (1945):

> "It is true the petitioner in the present proceeding joined the Governor, Treasurer and Auditor of the state as defendants, who 'together constitute the Board of Department of Treasury of the State of Indiana.' But, they were joined as the collective representatives of the state, not as individuals against whom a personal judgment is sought.... We have previously held that the nature of a suit as one against the state is

> to be determined by the essential nature and effect of the proceeding. [citations omitted]. And when the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (emphasis added).

Pennhurst State School & Hospital v Halderman, 465 US 89, 101 (1984):

> "'[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.'"

Kentucky v Graham, 473 US 159, 165-166 (1985):

> "Official-capacity suits, in contrast [to personal capacity suits], 'generally represent only another way of pleading an action against an entity of which an officer is an agent...[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity....It is not a suit against the official personally, for the real party in interest is the entity....[A] plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." (emphasis in opinion).

Papasan v Allain, 478 US 265, 278 (1986):

> "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. This is true if the relief is expressly denominated as damages....It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else." (e.g. "equitable restitution", "Edelman" [v Jordan, 415 US 651, 656 (1974)] 478 US at 280).

See: Monell v Department of Social Services of the City of New York, 436 US 658, 690 n. 55 (1978).

> "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent-at least where Eleventh Amendment considerations do not control analysis-...".

The few state cases that have been found from the period before Reconstruction support the proposition that an action against a state official in

the state official's official capacity is an action against the office held by the state official (that is, it is an action against the state); or, conversely, the prohibition on a state being sued in its own state courts without its consent may not be circumvented by bringing an action against an official. Auditor v Davies, 2 Ark 494, 504 (1840); League v DeYoung, 2 Tex 497 (1847).

The principle of these decisions is that an action for damages against a state officer in his official capacity is not an action against the state officer personally, but is an action against the state office held by the state officer, and the real party in interest is the state. Since, as has been shown in this brief, the state is not a "person" under

§1, there can be no cause of action for damages under §1 against a state officer in the state officer's official capacity. The fact that the real party in interest in the instant case is the State, which cannot be subject to a cause of action under §1983, differentiates this case from Brandon v Holt, 469 US 464 (1985), in which the entity which was the real party in interest was a municipality, which can be subject to a cause of action under §1983 after Monell, supra.

In a parallel development, another line of cases beginning in 1824 establishes the complementary principle that courts can exercise equitable jurisdiction over state officers sued for performing official acts that are alleged to be contrary to the Constitution or

federal law. The premise is that if the act is contrary to the Constitution or to federal law, then there was no authority for it, and the officer acted on her or his own; that is, she or he acted personally or individually, not officially. The Court said in Osborn v Bank of the United States, 22 US (9 Wheat) 738 (1824):

> "[T]he act is unconstitutional, and furnished no authority or protection to the officer who is about to proceed under it." 22 US at 838.
>
> "[T]he agent is not privileged by his connexion [sic] with his principal, ... he is responsible for his own act, to the full extent of the injury ...". 22 US at 843.
>
> "[I]f the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, ... [it will] furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

The Michigan Supreme Court employed the same principle in Michigan State Bank v

Hammond, 1 Doug 527, 533-534 (Mich 1845).

The Court in more recent times has permitted such suits, almost always in an 11th Amendment context, where the official function of the state official is alleged to be unconstitutional, or to be illegal as a matter of federal law. The premise is that "any action by a state official that is purportedly authorized by that [state] enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.", Papasan v Allain, 478 US 265, 276 (1986); and the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.", Ex parte Young, 209 US 12, 159-160 (1908).

The applicability of Ex parte Young is narrowly tailored to those prospective "[r]emedies designed ... to vindicate the federal interest in assuring the supremacy of that law.", Green v Mansour, 474 US 64, 68 (1985); or, put another way, "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst State School & Hospital v Halderman, 465 US 89, 105 (1984).

In Larson v Domestic & Foreign Commerce Corporation, 337 US 682, 690 (1949), the Court explained in a slightly different way why such suits were permitted:

> "[T]he conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form

but the grant is lacking in substance because of its constitutional invalidity."

In the circumstance of a state official being sued for prospective injunctive relief for performing an official function that is alleged to be a continuing violation of the Constitution or federal law, such a suit is not a suit against the state. Green v Mansour, 474 US 64, 68 (1985) ("Ex parte Young ... [asserted] that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State."); Kentucky v Graham, 473 US 159, 167 n. 14 (1985) ("[O]fficial-capacity actions for prospective relief are not treated as actions against the State."); and Pennhurst State School & Hospital v

Halderman, 465 US 89, 102 (1984) ("[A] suit challenging the constitutionality of a state official's action is not one against the State.").

Despite Petitioner's argument on page 29 of his brief, Kenosha v Bruno, 412 US 507, 513 (1973), is not applicable since there will be no bifurcated definition of the word "person". This action, which seeks only damages from the "Director of State Police" in his official capacity, is not against the Director as a person, it is in reality against the Director's office, and since the real party in interest is the State, the action cannot be maintained.

In summary: An action for damages against a state officer in her or his official capacity is not an action against

the state officer, but is an action against her or his state office, i.e., it is an action against the state. A suit against a state officer for prospective injunctive relief for the continuing performance of an official function that is alleged to be unconstitutional or in violation of federal law is not a suit against the state.

CONCLUSION

For the reasons stated in this brief, Respondents respectfully request that this Court affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

GEORGE H. WELLER
Assistant Attorney General
Attorneys for Respondents

August 2, 1988